**MOHD. LATIFF BIN SHAH MOHD. & 2 ORS.**

**v.**

**TENGKU ABDULLAH IBNI SULTAN ABU BAKAR & 8 ORS. & 2 OTHER CASES**

HIGH COURT MALAYA, KUALA LUMPUR
DATO' DR. ZAKARIA M YATIM J
[CIVIL SUITS NOS. C 22-204-86, F 23-96-86, C 23 -1084-86]
6 FEBRUARY 1995

***PRACTICE & PROCEDURE**: Action by club members - No existing public officer to commence action pursuant to Societies Act 1966 - Plaintiffs suing by way of representative action - Whether plaintiffs as members were competent to sue in their individual or collective capacity - Section 9(1) Societies Act 1966 - Order 15 r. 12 Rules of the High Court 1980.*

***UNINCORPORATED ASSOCIATIONS**: Promoters setting up club - Temporary licence granted by Registrar of Societies - Whether defendants as members of the protem committee were promoters of the Club - Whether the promoters owe a fiduciary duty to the Club or its members - Whether duty breached - Whether there was failure to exercise due care, skill and diligence.*

***CONTRACT**: Sale of shares in club by promoters - Whether sale agreement obtained by undue influence of plaintiffs - Section 16(1) & (2) Contracts Act 1950.*

This matter involved 3 consolidated civil suits of which only C.S. 1084/86 and C.S. 204/86 were proceeded with at trial.

In C.S. 1084/86, the plaintiffs (Allied Capital Sdn. Bhd.) sued the defendant (the secretary of the Raintree Club) as its registered officer. The plaintiffs claimed the sum of RM8,408,997, interest, damages and costs pursuant to a written agreement dated 24 August 1982 (the agreement) between the plaintiffs of the one part and Tengku Abdullah and General Yusoff (the 1st and 2nd defendants in C.S. 204/86), who were acting on behalf of the Club on the other part, whereby it was agreed that the plaintiffs would sell to the Club 1,540 class A shares and 660 class B shares of RM10,000 each in Raintree Development for the sum of RM47 million and which in breach of the agreement the Club failed to pay.

The defendant did not dispute the purchase of the shares for the said sum but averred that the agreement was tainted by undue influence of the plaintiffs. The defendant counterclaimed and contended that the true value of the said shares was RM24,597,162 and claimed the sum of RM16,571,734 being the difference between monies paid to the plaintiffs and the actual value of shares purchased. The plaintiffs counterclaimed for a declaration that the agreement was void and unenforceable and in the alternative sought an order that the parties be restored to their original position.

In C.S. 204/86, the plaintiffs (all the members of the Raintree Club except the defendants) commenced a representative action against Tengku Abdullah and General Yusoff and 7 other defendants, several of whom were major shareholders and directors of Allied Capital, Raintree Development and A.F. Holdings Sdn. Bhd., for damages for breach of fiduciary duty and for

damages for breach of duty to exercise due care, skill and diligence.

The defendants argued that the plaintiffs were incompetent to bring a representative action under O. 15 r. 12 of the Rules of the High Court 1980 (RHC 1980) as they were not members of the Club on 24 August 1982 when the cause of action, if any, accrued and alternatively, that the plaintiffs or any one of them was not a public officer within the meaning of s. 9(c) of the Societies Act 1966 (the Act).

The defendants also argued that the cause of action only accrued to the existing 11 members of the Club as at the date of the said agreement and denied any breach of fiduciary duty or negligence in the purchase of the shares. They contended that those becoming members after 24 August 1982 knew or ought to have known the costs involved in establishing the Club and were estopped from denying the validity of the agreement. The defendants further argued that the promoters of the Club, unlike that of a company, had no fiduciary relationship with the members of the Club.

**Held:**

**[1]** Eventhough there was no public officer of the Raintree Club at the material time, a member of a society has a right to sue in his individual capacity or collectively where, as in the present case, the members have a common interest in suing. Therefore, the plaintiffs in Civil Suit No. 204/86 are competent to bring this suit in a representative capacity.

**[2]** A fiduciary relationship does not exist only in relation to a company. A fiduciary relationship also exists between the promoters of the Club and the Club and/or the members of the Club as the plaintiffs entrusted the defendants as promoters to negotiate a contract on its behalf and relied on the promoters to obtain the best terms.

**[3]** Whether a person is a promoter is a question of fact to be decided by the Court. All the 9 defendants on the protem committee were promoters as they were responsible for obtaining the registration of the Club under the Act and for seeking the approval of the Registrar of Societies to operate the Club pending its registration. Accordingly, they have a fiduciary relationship with the Club.

**[4]** Each of the defendants had an interest either as shareholder or director or employee of the related companies involved in the sale of the shares in Raintree Development and were therefore not in a position to act impartially. The promoters failed to conduct an independant enquiry on the price of the shares and in the circumstances the interests of the Club was not protected. The defendants were in breach of their fiduciary duty to the Club and failed to exercise due care, skill and diligence. Consequently, all the members of the Club including the present members were liable to pay the purchase price for the shares.

**[5]** A contract may be induced by undue influence where the relationship between the parties is such that one party is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. A person is deemed to be in a position to dominate in a situation where he stands in a fiduciary relation to the other as in the present case. Thus, on the facts, the plaintiffs in Civil Suit No. 1084/86 were deemed to have exercised undue influence over the Club and/or its members when the agreement was executed.

*[Plaintiffs' claim in Suit No. 204/86 allowed. Plaintiffs' claim in Suit No. 1084/86 dismissed and judgment entered for the defendants' counterclaim for the sum of RM15,450,876 pursuant to prayer (a) and RM556,752 pursuant to prayer (b) with interests and costs. Plaintiffs' counterclaim dismissed].*

**Cases referred to:**
*National Assistance Board v. Wilkinson [1952] 2QB 648* ***(refd)***
*Campbell v. Thompson [1953] 1 QB 445* ***(dist)***
*The Karting Club of Singapore v. David Mark & 8 Ors. [1985] 2 MLJ 280* ***(refd)***
*Ong Boon Seong v. Syed Hussein Alatas [1972] 1 MLJ 218* ***(foll)***
*Tindok Besar Estate Sdn. Bhd. v. Tinjar Co. [1979] 2 MLJ 229* ***(foll)***
*Grace Shipping v. Sharp & Co. [1987] 1 MLJ 257* ***(foll)***
*Erlanger v. New Sombrero Phosphate Co. [1878] AC 1218* ***(foll)***
*Whaley Bridge Printing Co. v. Green and Smith [1879] 5 QBD 109* ***(refd)***
*Emma Silver Mining Company v. Lewis & Sons [1879] 11 LTR 749* ***(cit)***
*Swain & Anor. v. Law Society [1981] 3 ALL ER 797* ***(refd)***
*Roche v. Sherrington & Ors. [1982] 1 WLR 599* ***(refd)***
*National Westminister Bank v. Mogan [1985] 1 ALL ER* ***(refd)***
*Lloyds Bank v. Bundy [1975] 1 QB 326* ***(refd)***
*Tate v. Williamson*
*Mahesan v. Malaysian Government [1975] 1 MLJ 77, PC [1978] 1 MLJ 149* ***(refd)***

**Legislation referred to:**
Contracts Act, s. 16(1) & (2)
Rules of the High Court 1980, O. 15 r. 12
Societies Act 1966, s. 2, 9(c)

**Other sources referred to:**
*Halsbury's Laws of England*, 4th Edn. Vol. 7 para. 37
*Chitty on Contracts*, 25th Edn. Vol. 1 at p. 234

*(Civil Suit No. 204 of 1986)*
*For the plaintiffs - Raja Aziz Addruse (Benjamin Yean with him); M/s. Liza Chan & Co.*
*For the defendants - Cecil Abraham (R. Nathan with him); M/s. Shearn Delamore & Co.*
*(Civil Suit No. 96 of 1986)*
*For the plaintiffs - K. Anantham (J Yee with him); M/s. Skrine & Co.*
*For the defendants - Raja Aziz Addruse (Benjamin Yean with him); M/s. Liza Chan & Co.*
*For the defendants by counterclaim - Cecil Abraham (R. Nathan with him); M/s. Shearn Delamore & Co*
*(Civil Suit No. 1084 of 1986)*
*For the plaintiffs - K. Anantham (J Yee with him); M/s. Skrine & Co.*
*For the defendants - Raja Aziz Addruse (Benjamin Yean with him); M/s. Liza Chan & Co.*

**JUDGMENT**

**Zakaria M Yatim J:**

These three civil suits have been consolidated as one action with the consent of the parties concerned.

In Civil Suit 96 of 1986, the plaintiffs, Allied Capital Sdn. Bhd., is a private limited company incorporated in Malaysia (Allied Capital). The defendants, Raintree Development Bhd. is also a private limited company incorporated in Malaysia (Raintree Development). The plaintiffs'claim against the defendants as contained in the amended statement of claim is for the sum of RM16,283,411.58 being the amount due to the plaintiffs for the construction of the Raintree Club including professional fees and other expenses pursuant to an agreement dated 9 May 1981 and a subsequent agreement entered into between the parties. The defendants, in its amended statement of defence and amended counterclaim allege that the agreement dated 9 May 1981 was signed under the undue influence of the plaintiffs. The defendants says that at all material times all the directors of the plaintiffs were also the directors of the defendants. The defendants contend that the directors had acted in excess of their authority. The defendants also contend that the said agreement was entered into through bribery of the

defendants' directors. According to the defendants the agreement was entered into on behalf of the defendants by its directors, namely, Tengku Abdullah Ibni Almarhum Sultan Abu Bakar, (Tengku Abdullah), General Yusoff bin Abu Bakar (General Yusoff), Jose R. Reyes (Jose) and Ramon G. Madrid (Ramon) in collusion with Allied Capital and in breach of their fiduciary duty to the defendant.

In Civil Suit 1084 of 1986, the action is brought by Allied Capital against the secretary of the Raintree Club. He is sued as the registered officer of the Club. In the statement of claim, the plaintiffs state that by a written agreement dated 24 August 1982 entered into between the plaintiffs of one part and Tengku Abdullah and General Yusoff, both acting for and on behalf of the Club of the other part it was agreed that the plaintiffs would sell to the Club 1,540 Class A shares and 660 Class B shares of RM10,000 each in Raintree Development for the sum of RM47 million. It is alleged that the Club, in breach of cl. 3(A) of the Schedule C to the said agreement, failed to pay the remaining sum of RM8,408,997. The plaintiffs' claim is for the said sum together with interest and for damages and costs. The defendant does not dispute that the Club purchased the said shares from the plaintiffs for the sum of RM47 million but avers that the Club was induced to enter into the said agreement under the undue influence of the plaintiffs. The defendant states *inter alia*, that at all material times Tengku Abdullah and General Yusoff were the major shareholders of Allied Capital and Raintree Development. The defendant counterclaims and contends that the true value of the said shares is RM24,597,162 and the defendant is entitled to counterclaim the sum of RM16,571,734 being the difference between the monies which have been paid to the plaintiffs and the actual value of the shares purchased. The plaintiffs, in its reply and defence to the counterclaim, deny that it had induced the Club to enter into the said agreement through undue influence. There is also a counterclaim to the defendant's counterclaim. In the plaintiff's counterclaim, the plaintiff asks for a declaration that the agreement dated 24 August 1982 is void and unenforceable. In the alternative the plaintiffs ask the Court to restore the parties to their original position.

In Civil Suit 204 of 1986, the plaintiffs are suing on behalf of themselves and all other members of the Raintree Club except the defendants. The defendants are Tengku Abdullah, General Yusoff and seven others. The plaintiffs' claim against the first, second, third and fourth defendants is for damages for breach of fiduciary duty. The claim against all the defendants is for damages for their breach of duty to exercise due care, skill and diligence. In the statement of claim, the plaintiffs state that the establishment of the Raintree Club called for the acquisition of all the issued and paid up capital of Raintree Development. At all material times the issued and paid up shares of Raintree Development were held by Allied Capital. The first and second defendants were the major shareholders of Allied Capital. At all material times the first, second and fourth defendants were directors of Allied Capital, Raintree Development and another Malaysian incorporated company known as A.F. Holdings Sdn. Bhd. The defendants in their reamended statement of defence aver that the plaintiffs are incompetent in law to bring a representative action within the meaning of O. 15 r. 12 of the Rules of the High Court 1980 as the plaintiffs were not members of the Raintree Club as at 24 August 1982 when the said cause of action, if any, accrued. Alternatively the plaintiffs or any one of them is/are not and/or have never been public officers within the meaning of s. 9(c) of the Societies Act 1966. The defendants contend that when the agreement dated 24 August 1962 was entered into, the only members of the Raintree Club were, Tengku Abdullah, Yusoff, John Low Nyap Heng, Yeoh Chong Swee, Leonard Tham, Tengku Azlan, Abdul Kadir Kassim, Clifford Tan, Lt. Col. Zarazillah, Junaidah Mohd Said and Angelina Low and therefore any cause or action based on breach of fiduciary duty or breach of duty to

exercise due care and diligence accrued only to the eleven persons. The defendants deny that they were in breach of their fiduciary duty or negligent in agreeing to purchase the shares in Raintree Development for $47 million. The defendants further contend that those who became members of the Club after 24 August 1982 knew or ought to have known the costs involved in establishing the Club and therefore they are estopped from denying the validity of the said agreement.

At the trial, Civil Suit 96 of 1986, was not proceeded with. I shall therefore confine my judgment to Civil Suit 1084 of 1986 and Civil Suit 204 of 1986. I shall deal with Civil Suit 204 of 1986 first.

It is not in dispute that at the time the suit was filed, the Raintree Club was registered under the Societies Act, 1966. It is contended by Mr. Cecil Abraham, Counsel for the defendants, that the plaintiffs or any one of them is not a public officer within the meaning of the Societies Act and therefore they are not entitled to commence the action. According to him under the Act, a Society can only sue in the name of its public officer. Raja Aziz, Counsel for the plaintiffs, on the other hand, submits that the plaintiffs are proceeding with the suit by way of representative action pursuant to O. 15 r. 12.

The first point for the Court to consider is whether Civil Suit 204 of 1986 is properly before the Court. Section 9(c) of the Societies Act provides:

> (c) a society may sue or be sued in the name of such one of its members as shall be declared to the Registrar and registered by him as the public officer of the society for that purpose, and, if no such person is registered, it shall be competent for any person having a claim or demand against the society to sue the society in the name of any office-bearer of the society;

Under s. 2, the word "societies" includes a club such as the Raintree Club.

Raja Aziz submits that s. 9(c) does not remove the right of members of a club to institute action individually or collectively by way of representative action. He says that the section does not contain a mandatory requirement. In any event at the material time the Raintree Club did not have a public officer. This point is not disputed. He contends that the section cannot take away the fundamental right of individual members of a society to sue as plaintiffs in relation to legal wrongs done to them. He then cites *National Assistance Board v. Wilkinson* [1952] 2 QB 648. In that case, Devlin J in his judgment at p. 661 said, "It is well established principles of construction that a statute is not to be taken as affecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion."

Mr. Cecil Abraham on the other hand, cites *Campbell v. Thompson* [1953] 1 QB 445; *The Karting Club of Singapore v. David Mark & 8 Ors.* [1985] 2 MLJ 280; and *Ong Boon Seong v. Syed Hussein Alatas* [1972] 1 MLJ 218. In *Campbell v. Thompson* Pilcher J decided,

> as all the members of the club had, both as employers and as technical occupiers of the club premises, the same common interest in resisting the plaintiff's claim, and as the two defendants were persons who could fairly be taken as representing the body of the club members, a representation order might be made. The only members, however, who could properly be sued in the proceedings were those persons who were members of the club at the time of the plaintiff's fall, and the order to be made must, therefore, be restricted to such persons.

That case dealt with the question whether members of a society at the time liability incurred would be liable. In that case the plaintiff was an employee of the Club. The Court allowed the two defendants to represent the Club in that action. In *The Karting Club of Singapore,*

Chua J decided that an unincorporated member club, not being a partnership or legal entity, can sue or be sued in the name of the Club. It is to be noted that in that case the suit was filed by the Club itself. In *Ong Boon Seong v. Syed Hussein Alatas*, Abdul Hamid J as he then was, said at p. 221,

> It is argued that the plaintiff has no right to start this action for and on behalf of the society as he is not a registered public officer. Mr. Ng Ek Teong Counsel for the plaintiff submitted that the plaintiff is suing in his own name and he has properly instituted this legal action on the grounds, first, as a member, he instituted this legal action in the capacity of his individual right as a member. Secondly, he sues in his own right as a person who has been appointed secretary-general; and thirdly, he sues in the representative capacity authorised by the central committee. To my mind, it cannot be denied that as a member of the party, the plaintiff has the right to sue. Whilst it may be true that he sued in his own name, the fact remains that at all material times, he was holding the office of deputy secretary-general and a member of the central committee. In my opinion, the plaintiff is competent to institute these proceedings.

It is clear from the passage in the judgment of Abdul Hamid J quoted above that the plaintiff in that case was held competent to institute the proceeding even though he was not a registered public officer.

After considering the authorities cited above, I am satisfied that the plaintiffs in Civil Suit 204 of 1986 are competent to bring this suit in representative capacity even though none of them is a public officer of the Raintree Club.

It is the defendants' case that as at 24 August 1982, when the sale and purchase agreement for the acquisition of the shares was executed, the defendants were the only members of the Club and accordingly, none of the plaintiffs is competent to bring the action against the defendants in respect of the purchase of the said shares. Raja Aziz, however, submits that as at 24 August 1982 when the sale and purchase agreement was entered into, the defendants were not yet full members of the Club because the Club had not been registered under the Societies Act. He says that the defendants were only provisional members at that time.

It is now necessary to examine whether as at 24 August 1982, the defendants were the only members of the Club. The meeting to form the Raintree Club was held a 20 October 1981. (See AB2 p. 1). Twelve persons were present at the meeting, including all the nine defendants. At the meeting, a protem committee was appointed to take the necessary steps to obtain registration of the Club. On 7 January 1982, the protem committee was informed that an application for a temporary licence had been submitted to the Registrar of Societies. In a letter dated 23 February 1982 (AB1 p. 1) the Registrar of Societies granted a temporary licence subject to three conditions.

The letter states:

**Kebenaran Bergerak Sementara**

Setiausaha,
The Raintree Club of Kuala Lumpur,
7th Floor, MUI Plaza,
Jalan Parry,
Kuala Lumpur.

Tuan,

**The Raintree Club of Kuala Lumpur**

Adalah saya dengan hormatnya merujuk kepada permohonan tuan untuk mendaftarkan pertubuhan yang tersebut di atas dan memaklumkan bahawa sebelum didaftarkan pertubuhan tuan dibenarkan bergerak sementara dengan berdasarkan rang undang-undang yang telah dihantarkan ke Jabatan ini serta tertakluk kepada syarat-syarat yang berikut:

(i) Pertubuhan ini tidak boleh bergabung atau mempunyai hubungan di luar Persekutuan;

(ii) Kebenaran ini hanya berkuatkuasa sehingga satu-satu keputusan diambil oleh Pendaftar ke atas permohonan pendaftaran pertubuhan tuan;

(iii) Kebenaran ini boleh ditarikbalik pada bila-bila masa yang difikirkan perlu oleh Pendaftar.

Saya yang menurut perintah,

Sgd.
(Ahmad Kamal bin Mohd. Sahaja)
Pendaftar Pertubuhan,
Malaysia.

The Club was only registered under the Act on 20 January 1983. The certificate of registration states:

Perakuan Pendaftaran

Adalah dengan ini diperakui bahawa Kelab Raintree Kuala Lumpur (The Raintree Club of Kuala Lumpur), 7th Floor, MUI Plaza, Jalan Parry, Kuala Lumpur.

telah pada hari ini didaftarkan sebagai suatu pertubuhan di bawah seksyen 7 dalam Akta Pertubuhan, 1966, dan bahawa nombor pendaftarannya ialah 3301 (Selangor)

Diperbuat dengan ditandatangani oleh saya pada 20 haribulan Januari 1983.

Sgd.
(Zakiah bt. Hashim)
Pendaftar Pertubuhan,
Malaysia

After the temporary licence was granted and before the certificate of registration was issued, a general committee was appointed by the protem committee. At its meeting held on 24 February 1982, the protem committee passed a resolution admitting the eleven persons, including the nine defendants to membership of the Club. The resolution is reproduced below:

Reference was made to the Inaugural Meeting held on October 20, 1981 and it was resolved:

**That** the following persons who were present at the Inaugural Meeting and have indicated the desire for admission to Membership in the Club be and are hereby admitted to Membership in the Club subject to their completion of their respective application forms and the payment of the entrance fee.

**Initial Members**

YM Tengku Abdullah Ibni Almarhum Sultan Abu Bakar
YM Tengku Azlan Ibni Almarhum Sultan Abu Bakar
(representing Tadco Sdn Bhd)
Brigadier Jenderal Yusoff b Abu Bakar
Lt Col Zarazilah b Mohd Ali
Patrick Yeoh Chong Swee
John Low Nyap Heng
Leonard Tham
Abd Kadir
Junaidah
Angeline Low
Clifford Tan

Under r. 38 of the Club's Constitutional Rules, the General Committee was only established after the Club was registered.

Mr. Cecil Abraham submits that all the defendants were full members of the Club as at 24 August 1982. But Raja Aziz pointed out that by a resolution dated 8 April 1982 (AB3 p. 1 & Pla-1q) the Membership Committee admitted the names listed in the Schedule to the resolution as provisional members. These names include the names of the nine defendants. Miss Jasmine Ng Yew Kan (DW2) who was then the membership coordinator testified in Court that the said names were typed in by mistake. Under cross-examination the witness admitted that the mistakes were discovered only after the present suit was filed (See Notes of Evidence, p. 255). Raja Aziz's comment on DW2's evidence is as follows; "It looks very strange that the mistakes were discovered only after the plaintiffs instituted the action against the defendants ..." He submits "... The defendants' evidence smacks of an afterthought designed conveniently to fit the defence ..." He then cites *Tindok Besar Estate Sdn. Bhd. v. Tinjar Co.* [1979] 2 MLJ 229; and *Grace Shipping v. Sharp & Co.* [1987] 1 MLJ 257. According to those two cases, where there are contemporaneous documents, anything said very much later regarding the event must be tested against those documents which tend to reflect more accurately the actual event. I agree with Raja Aziz's submission. In my view the documentary evidence must prevail. In any event, since the Club was registered only on 20 January 1983, the defendants could not have become full members of the Club as at 24 August 1982.

Since the defendants were not full members of the Club as at 24 August 1982, I do not think that *Campbell v. Thompson* applies to the present case.

It is the contention of the plaintiffs that they are competent to sue the defendants in representative capacity. It is also the contention of the plaintiffs that the defendants were the promoters of the Club and they were therefore in fiduciary relationship with the Club.

I shall consider the second point first. In considering this point it is necessary to ascertain who is the promoter of the Club. Raja Aziz relies heavily on the House of Lord's decision in *Erlanger v. New Sombrero Phosphate Co.* [1878] AC 1218. In that case *Erlanger* and his syndicate were the promoters of a company.

I think it is relevant to consider who is the promoter of a company. In *Whaley Bridge Printing Co. v. Green and Smith* [1879] 5 QBD 109; Bowen J, in his judgment at p. 111, said, "The term promoter is a term not of law, but of business, usefully summing up in a single word a number of business operations familiar to the commercial world by which a company is generally brought into existence." The question whether a person is or is not a promoter is a question of fact depending upon what the so called promoter really did and a Judge in summing up to a jury is not bound to define the term. See *Halsbury's Laws of England*, 4th Edn. Vol. (7) para. 37. See also *Emma Silver Mining Company v. Lewis & Sons* [1879] 11 LTR 749.

It is settled law, that promoters of a company are in fiduciary relationship with the company. In *Erlanger* case's, Lord Cairns LC in his speech at p. 1236, said,

> In the whole of this proceeding up to this time the syndicate, or the house of *Erlanger* as representing the syndicate, were the promoters of the company, **and it is now necessary that I should state to your Lordships in what position I understand the promoters to be placed with reference to the company which they proposed to form. They stand, in my**

**opinion, undoubtedly in a fiduciary position**. They have in their hands the creation and moulding of the company; they have the power of defining how, and when, and in what shape, and under what supervision, it shall start into existence and beign to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life, become, through its managing directors, the purchaser of the property of themselves, the promoters, it is, in my opinion, incumbent upon the promoters to take care that in forming the company they provide it with an executive, that is to say, with a board of directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial Judges as to whether the purchase ought or ought not to be made. I do not say that the owner of property may not promote and form a joint stock company, and then sell his property to it, but I do say that if he does he is bound to take care that he sells it to the company through the medium of a board of directors who can and do exercise an independent and intelligent judgment on the transaction, and who are not left under the belief that the property belongs, not to the promoter, but to some other person. (Emphasis added).

The facts of that case as stated in the head note are as follows:

A 'syndicate' (or partnership) of persons, of which one **E**. was at the head, purchased from the official liquidator of an insolvent company an island said to contain valuable mines of phosphates. **E**., who managed the business of this purchase, prepared to get up a company to take over the island and to work the mines. He named five persons as directors. Two were abroad. Of the three others, two of the proposed directors were persons entirely under his control, and were furnished by him with the shares which were set forth in the memorandum of association as necessary to qualify for the office of director. One of these two persons appeared to have acted as a business agent for **E**.; the other was a private friend of **E**. The sale of the island was made, nominally, by a person who had really no interest in the island, and was made to the director who was the business agent of **E**., and who appeared as the purchaser for the company. The two directors, with whom, through **E**.'s arrangement, a third person, **D**. (one entirely uninformed on the subject of the original purchase, and the subsequent sale), was associated, assuming to act as directors of the company, accepted, on its behalf, the purchase. A prospectus was issued, giving a very favourable account of the scheme. Many persons took shares. At the first meeting of shareholder, **D**. took the chair as a director. Being questioned by a shareholder as to certain rumours relating to the purchase of the island and its price, on the first sale, and then on its resale to the company, **D**. avowed his want of knowledge, but declared his belief in the goodness of the scheme. The real circumstances of the sale and purchase were not disclosed to the shareholders, but the purchase of the island was adopted by the shareholders then present. This was in February 1872. In June 1872, there was a general meeting of the shareholders. The rumors before referred to had become stronger, and a committee of investigation was appointed; on the receipt of whose report in August 1872, the original directors were, at a public meeting, removed, and a new set of directors appointed, with power to take measures, & c., for the benefit of the company. The new directors entered into a correspondence with the vendors of the island, which terminated in nothing, and a bill was, in December 1872, filed to rescind the contract.

Lord Blackburn in his speech at pp. 1267 & 1268 in that case, said,

They farther said that when the vendors promoted and formed a company for the purpose of purchasing at that price, they were not entitled to treat that company as a stranger. **As promoters of a company they stood in a fiduciary position towards the company they were creating, and that the bargain between the promoters and that company could not stand unless more was done for the purpose of protecting the interest of that company then was done in this case**. It seems to me that the 21st. paragraph of the plaintiff's bill does sufficiently allege such a case; and the first question which I think has to be considered

is whether enough is proved in fact, to make a case good in law under which, if the plaintiffs had come promptly, they would have been entitled to the relief given by the decree appealed against. (Emphasis added).

Lord Blackburn went on to state at pp. 1268 & 1269 as follows:

I proceed to consider the first of these questions. Throughout the Companies Act, 1862 (25 & 26 Vict. c. 89), the word 'promoters' is not anywhere used. It is, however, a short and convenient way of designating those who set in motion the machinery by which the Act enables them to create an incorporated company.

Neither does this Act in terms impose any duty on those promoters to have regard to the interests of the company which they are thus empowered to create. But it gives them an almost unlimited power to make the corporation subject to such regulations as they please, and for such purposes as they please, and to create it with a managing body whom they select, having powers such as they choose to give to those managers, so that the promoters can create such a corporation that the corporation, as soon as it comes into being, may be bound by anything, not in itself illegal, which those promoters have chosen . And I think those who accept and use such extensive powers, which so greatly affect the interests of the corporation when it comes into being, are not entitled to disregard the interests of that corporation altogether. They must make a reasonable use of the powers which they accept from the Legislature with regard to the formation of the corporation, and that requires them to pay some regard to its interests. And consequently they do stand with regard to that corporation when formed, in what is commonly called a fiduciary relation to some extent ... I think, as already said, that the promoters are in a situation of confidence to some extent towards the company they form.

Where as in the present case, the company is formed for the purpose of becoming purchasers from the promoters as vendors, the interests of the promoters and of the company clash. It is the vendor's interest to get as high a price as possible, and they have a strong bias to overvalue the property which they are selling; it is the purchasers' interest to give as low a price as possible, and to secure that the price actually given is not more than the property is really worth to them.

At pp. 1272 & 1273 Lord Blackburn said,

And as early as 5 September, six days only after the bargain was bound, subject to the approval of the Vice-Chancellor, and ten days before that approval, *Westall* began to take steps to form that company.

Mr. *Westall* proceeded to take all the legal steps for the formation of the company. He drew up the memorandum of association. He prepared a contract, the contract to be made between *Evans* (in whose name the contract with *Chatteris* had been made) and one *Pavy*, for the sale to *Pavy* of this property for £110,000, subject to the new company, then in process of formation, being duly formed and completed. And by a memorandum, signed after it was formed, *Pavy* declared himself to have signed as agent for that company. *Pavy* was a nominee of the syndicate, who certainly could give no independent protection to the interests of that company. But it was never pretended that he would do so, or could do so. He had no more to do with the substance of the matter than the releasee to uses has to do with the substance of the conveyance. His name was used as a part of the machinery by means of which, under the powers in the articles of association, the property of the promoters was to be transferred to the company for £110,000. Other machinery might have been adopted to effectuate this, but if sufficient steps had been taken otherwise to protect the interest of the company, I do not see that any complaint could justly have been made of the adoption of this machinery.

The memorandum of association was signed by *John Marsh Evans* and six other persons, all of whom it was admitted were mere nominees of the syndicate, and none of them was in a condition to afford disinterested protection to the interests of the company.

Mr. *Westall* also prepared the articles of association for the company. Two of the articles were important, namely: (65) The number of directors shall from time to time be determined by the company in general meeting; until any other number is so determined there shall not be less than four directors nor more than seven. The first directors shall be, His Excellency Monsieur *Drouyn de Lhuys*, *E. B. Eastwick*, Esq., the Right Honourable *Thomas Dakin*, *John Marsh Evans*, Esq, and Rear-Admiral *R. John Macdonald.'* Of those five persons thus named as the first directors, one, Mr. *Evans*, was from his position incapable of affording the company disinterested protection. In my mind, the real question here is whether the other four, or any of them, were persons so situated that they could form an unbiased judgment for the company, and, if they were, whether the promoters had given them such information, and so acted towards them, as to be entitled to act on the belief that they had exercised that unbiased judgment.

At p. 1275, Lord Blackburn said,

and I think if Mr. *Westall* had been acting for a purchaser he would probably have tested this more closely than he did. But more than this I think was not proved.

How, then, stands the case as to the five persons named as the first directors? Mr. *de Lhuys* was requested by *Erlanger* to act as a director, and he assented. It is not pretended that he made, or was expected to make, any independent inquiry on behalf of the company. He was asked to be a director because, from his position, he would be influential in promoting the sale of phosphate on the continent; and he assented, trusting entirely to Baron *Erlanger*. I see no harm in this on either side, but it afforded no protection to the company.

At p. 1276 he said,

I think this is quite enough to show that there could be no protection afforded to the company by any independent inquiry on the part of *Eastwick*.

As to Admiral *Macdonald*, I do not suppose he would have lent himself to anything he thought wrong, but he evidently came into the company with a foregone conclusion that everything his not a *bona fide* belief on his part, but he came in under such circumstances that he could not be expected to make any independent inquiry; and if he had made one, it would have required very great moral courage in him under such circumstances to say that anything done by *Erlanger*, was wrong. Under such a bias he could afford no protection to the company.

*Evans* was the agent of the syndicate. The company could not therefore, have any protection unless from Sir *Thomas Dakin*. He was, or had recently been, Lord Mayor. He was quite disinterested, and he embarked his own money in the company; and he certainly ought before lending his name as a director to have made some inquiry, especially as it is impossible to suppose he was not aware that those getting up the company were the vendors of the lease. The evidence as regards him is in such a state as to give me much embarrassment.

From the passages quoted above, the position may be briefly summarised as follows:

The syndicate as promoters of the company stood in a fiduciary position. It was incumbent upon them to inform the board of directors of the company that the company was buying the property of the promoters. The board of directors was the competent judge to decide whether or not to buy the property. The purchaser of the property must be in a position to exercise an intelligent judgment on the transaction. The promoters were in a situation of confidence towards the company and therefore they cannot act in such a way that as a result it afforded no protection to the company. The bargain between the promoters and the company could not stand unless more was done for the purpose of protecting the interest of the company. In *Erlanger* the directors of the company were named by the syndicate.

They were the friends of Erlanger and they were not expected to make independent enquiry. There was bias on the part of the promoters and accordingly there was no protection afforded to the company.

Mr. R S Nathan, who is also Counsel for the defendants says that he is not challenging the principles laid down in *Erlanger* case. He argues, however, that in the case of a club the promoters have no fiduciary relationship with the members of the Club they seek to promote.

Raja Aziz, however submits that the fiduciary duty arises when the relationship between the parties to a contract is of a confidential or fiduciary nature. He refers to *Chitty on Contracts*, 25th Edn., Vol. 1 at p. 234, where a fiduciary relationship is described as follows:

> The fiduciary or confidential relationship necessary to bring this doctrine into operation extends to certain obvious ties, such as those between trustee and *cestui que trust*, solicitor and client, and parent and child. But the Courts have not fettered their jurisdiction by defining its limits, and are ready to interfere in order to protect the person who is under the influence of another. The principle was stated in *Tate v. Williamson:* 'Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.'

He also cites *Swain & Anor. v. Law Society* [1981] 3 ALL ER 797 when the English Court of Appeal decided:

> It was a strict rule of equity that a person who owed a fiduciary relationship to another was accountable to that person for any profit or advantage derived from the relationship. The Law Society, by entering into the master policy arrangement with the insurers on behalf of all solicitors and with the object of holding the benefit of the insurers' obligations as trustee for individual solicitors, thereby established a fiduciary relationship between itself and individual solicitors, and since the opportunity to obtain commission was derived from the master policy arrangement the society had therefore obtained the commission by reason of its fiduciary position, notwithstanding that the contract between the society and the insurers was concluded before the fiduciary relationship arose or that the society had acted *bona fide* throughout. Furthermore, in agreeing to receive the commission the society had placed itself in a position where its duty as trustee arising out of the fiduciary relationship and its own interest in receiving commission might conflict. It followed that in principle the society was accountable to individual solicitors who paid premiums under the scheme for the commission received by it (see p. 805f to p. 806b, p.809 a to e, p. 810 a to f, p. 814 a to c, p. 817 d to f, p. 819 e to h, p. 820 h and p. 822 j to p. 823 c and j to 824h, post); *Regal (Hastings) Ltd. v. Gulliver* [1942] 1 ALL ER 378 applied.

Stephenson LJ, in his judgment at pp. 806 & 807 said:

> I find some support for my opinion that a fiduciary relationship was established between the Law Society and the solicitors when it negotiated the original contract in the judgment of the Court of Appeal in *Re Reading's Petition of Right* [1949] 2 ALL ER 68, [1949] 2 KB 232 which was approved on appeal by every member of the House of Lords: *Reading v. Attorney General* [1951] 1 ALL ER 617, [1951] AC 507. In giving the judgment of the Court of Appeal, Asquith LJ ([1949] 2 ALL ER 68 at 70, [1949] 2 KB 232 at 236) concluded from a consideration of the authorities that:

> for the present purpose a "fiduciary relation" exists... (b) whenever the plaintiff entrusts to the defendant a job to be performed, for instance, the negotiation of a contract on his behalf or for his benefit, and relies on the defendant to procure the best terms available.

Oliver LJ, in his judgment at p. 817 said, "What was held on trust therefore was the benefit of that engagement, and it is that trust and ... that trust alone which gave rise to any fiduciary relationship between the Law Society and the solicitors required to be insured..."

Raja Aziz next refers to *Roche v. Sherrington & Ors.* [1982] 1 WLR 599 where Slade J held:

> **there was no reason in principle why a special fiduciary relationship could not exist between a plaintiff and an unincorporated association**, and that the plaintiff had, on the basis of the facts pleaded, an arguable case that there existed between himself and the persons who were for the time being members of the Opus Dei at the several dates of the relevant transactions the relevant fiduciary relationship that was necessary; but that since the statement of claim was formulated as a claim against all the present members of Opus Dei, many of whom were not members thereof at the relevant dates, and since it was not alleged that the present members either had benefited or were capable of benefiting from the relevant payments or that the first defendant had personally done anything wrong or benefited in any way, no reasonable cause of action was disclosed against him or the present members of Opus Dei, on whose behalf he was being sued (post, pp. 607H - 608E, G - 609D). (Emphasis added)

At p. 608 of his judgment, Slade J said:

> In considering whether, as a matter of principle, a transaction between an individual and an unincorporated association may give rise to a presumption of undue influence on the part of the members of such association, I think it may be helpful to give a hypothetical example. A man might entrust the management of his assets to a corporate merchant bank, in circumstances which made it plain that he was looking to the bank as a whole to safeguard his interests. He might do so without entering into a special personal relationship with any individual representatives of it. Subsequently, during the continuance of this arrangement he might enter into a particular transaction with that bank dealing with one of those assets but without receiving independent advice. It could be that this transaction conferred substantial benefits on the bank but had not, on the facts, been induced by any particular representative of it. On such hypothetical facts, I see no reason in principle why the Court should not hold that there existed a special fiduciary relationship between bank and customer, which placed on the bank the onus to justify the transaction. If this be right, I think it must at least be arguable that the relevant relationship could have existed, even if the bank were an unincorporated association. Accordingly, the first defendant has not satisfied me that the plaintiff's case must inevitably fail on this particular point.

From the authorities cited by Raja Aziz, it can be concluded that fiduciary relationship does not exist only in relation to a company. Such relationship also exists between two persons such as when A entrust to B the negotiation of a contract on A's behalf or for A's benefit and relies on B to procure for A the best term available. Fiduciary relationship also exists between solicitor and client and between bank and customer, and in *Roche v. Sherrington*, between the plaintiff and an unincorporated association. In the circumstances, I am satisfied that there is fiduciary relationship between the promoters of the Raintree Club and the Club and/or the members of the Club. In my opinion, *Erlanger* case applies to the present case.

It is now necessary to consider who are the promoters of the Raintree Club. In para. 2 of the amended statement of claim, the plaintiffs state that the establishment of the Raintree Club was conceived and **promoted** by the first and second defendants in conjunction with a foreign - incorporated company known as "Ayala International Finance Ltd.' Paragraph 11 of the amended statement of claim alleges that the first, second, third and fourth defendants were

in breach of their fiduciary duty. Paragraph 12 of the amended statement of claim alleges that all the defendants were in breach of their duty of care, skill and diligence in the acquisition of the shares in question. In prayer (1) of the amended statement of claim, the plaintiffs claim as against the first, second, third and fourth defendants damages for breach of fiduciary duty. In prayer (2) the claim for damages for breach of duty to exercise due care, skill and diligence against **all the defendants**.

In his written submission at p. 2 para. B(3), Raja Aziz raises the question, "whether the defendants were in fiduciary relationship with members of the Club" At p. 15, under the heading "Summary" he states, "... the defendants as members of the protem committee of the Club were **promoters** of the Club," (Emphasis added).

At page 20, he states, "On the evidence before the Court, it is submitted that the defendant had been in breach of their fiduclary duty."

In his oral submission at page 603 of the Notes of Evidence, he refers to the third issue, namely, whether the defendants were in fiduciary relationship with the members of the Club?" At page 672 of the Notes of Evidence, he says "It is submitted that on issue (3) the defendants were in a fiduciary relationship with the members of the Club...". At page 676 he states, "... the first and second defendants and the other defendants (as the other promoters of the Club) had failed in their duty and the Club was not put in a position of forming an intelligent and independent judgment with regard to the purchase of shares... It is their duty to conduct themselves which would not breach that fiduciary duty.."

Raja Aziz's submission gives me the impression that he is saying that all the defendants are the promoters of the Club and therefore in fiduciary relationship with the Club.

Mr. Cecil Abraham, in his written submission at p. 63 does not appear to dispute that the nine defendants are the promoters of the Club. He says,

> The nine defendants were the original Protem Committee members. They were what may be termed loosely the 'promoters' of the Club in the sense that they were, together with two others, Junaidah and Angeline Low, the 'initial' founder members of the Club.

I think Mr. Cecil Abraham uses the term promoters "loosely" because in his submission he is contending that whilst promoters of a company are in fiduciary relationship with the company, promoters of a Club do not have such relationship. He explains; "whilst what authority there is relates to promoters of companies, there is no authority which clothes the founder members of a club with the status of fiduciary..."

I have earlier expressed my opinion on the law that the promoters of the Raintree Club are in fiduciary relationship with the Club. In my view Mr. Cecil Abraham does not appear to dispute the fact that the nine defendants are the promoters of the Club, subject to the qualification that they are not in fiduciary relationship with the Club.

After considering the submission of both Raja Aziz and Mr. Cecil Abraham on the question of who are the promoters of the Raintree Club, it is necessary for me to consider the facts in the present case because the question of whether a person is or is not a promoter is a question of fact to be decided by the Court.

The concept of the Raintree Club was first introduced by the Ayala Group of the Philippines when it first started operation in Malaysia in 1978. Tengku Abdullah and General Yusoff were closely associated with the Ayala Group and they, together with the Ayala Group, mooted the idea of the Club. The Club was to be built on a piece of land owned by Raintree Development. The original owners of Raintree Development were Peter Yeoh, Tan Chin Yong,

Low Nyap Heng and a few others. There were 1.5 million shares. In 1979, the shares in Raintree Development were acquired by Tengku Abdullah (412,501 shares), General Yusoff (487,500 shares), and Ramon Madrid (300,000 shares). Raintree Development was acquired on a joint venture basis. The fourth defendant, Yeoh Chong Swee was appointed by Tengku Abdullah and General Yusoff as the director of the company on 1 June 1979, but he was not a shareholder. Tengku Abdullah and General Yusoff, became its directors on 17 August 1979. By the end of 1979 the majority shareholders of Raintree Development were Tengku Abdullah and General Yusoff. The original idea was to issue a prospectus and shares in Raintree Development and offer for sale to the public. An application was made to the FIC but the application was not approved. The FIC indicated that the Club be registered under the Societies Act.

Allied Capital was incorporated on 20 May 1980. It was a shell company. The company was acquired to be the developer of the Raintree Club. The shareholders of Allied Capital are Tengku Abdullah, General Yusoff, Jose R. Reyes, Ramon Madrid and Low Nyap Heng. The majority shareholders are Tengku Abdullah and General Yusoff. Yeoh Chong Swee was appointed director of Allied Capital by Tengku Abdullah and General Yusoff. He is not a shareholder. On 29 January 1981, Raintree Development sold part of its land to a company known as Cosmopleks. The company was set up by the joint venture partners to acquire the land for condonomium development. It was incorporated in 1981. Tengku Abdullah and General Yusoff were the only shareholders of Cosmopleks. The directors were Tengku Abdullah, General Yusoff, Low Nyap Heng and Yeoh Cheng Swee. By December 1982 there were other shareholders of Cosmopleks.

The meeting to form the Raintree Club was first held on 20 October 1981. It was attended by 12 persons including all the defendants. The meeting appointed a protem committee to take the necessary steps to obtain registration of the Club. Paragraph 3 of the minutes of the meeting is reproduced below:

3. **Appointment of a Protem Committee**

The meeting then elected a protem committee to take the necessary steps to obtain registration of the proposed club in accordance with the laws of Malaysia. The following were unanimously elected to the offices indicated:

| | | |
|---|---|---|
| Chairman | : | YM Tunku Abdullah Ibni Al-Marhum Sultan Abu Bakar |
| Vice-Chairman | : | Brig. Gen Yusoff Abu Bakar (Rtd.) |
| Secretary | : | Encik John Low Nyap Heng |
| Assistant Secretary | : | Cik Elizabeth Goon Pek Chin |
| Treasurer | : | Tham Wai Hoong |
| Committee | : | Encik Yeoh Chong Swee |
| | | Encik Abdul Kadir Hj. Md. Kassim |
| | | YM Tengku Azlan Ibni Al-Marhum Sultan Abu Bakar |
| | | Lt. Col. Zarazilah Mohd. Ali (Rtd.) |
| | | Encik Clifford Tan Chwee Siang |

In my opinion the members of the protem committee listed above were the promoters of the Club. The task of the committee was (1) to obtain registration of the Club under the Societies Act and (2) to seek the approval of the Registrar of Society to operate the Club pending its

registration. All the nine defendants were in the protem committee and they were therefore the promoters of the Club. I think this point is not in dispute. Both Raja Aziz and Mr. Cecil Abraham have submitted that the defendants who sat in the protem committee were the promoters of the Raintree Club. Since all the defendants were the promoters of the Raintree Club, they are therefore in fiduciary relationship with the Club.

The next question to consider is whether there has been a breach of the fiduciary relationship.

The sale and purchase agreement dated 24 August 1982 was entered into between Allied Capital on the one hand and Tengku Abdullah and General Yusoff who signed on behalf of the members of the Club. I have carefully examined the signature of the director who signed the agreement on behalf of Allied Capital and I am satisfied that it is the signature of Yeoh Chong Swee, who was also at the material time a member of the protem committee of the Club. (See his signatures in AB2, pp. 8, 36, 38, 42 & 45). In his evidence at p. 340 Yeoh Chong Swee admits that he was appointed director of Allied Capital in 1981. The person who signed as secretary of Allied Capital is Low Nyap Heng, who was also a member of the protem committee of the Club. His signature in the agreement is similar to that found in AB2 pp. 8, 40, 45. With regard to Tengku Abdullah and General Yusoff, it is clear that they are the major shareholders of Allied Capital. In my opinion these four persons are in effect the vendors as well as the purchasers and promoters of the Club. The situation is similar to that in *Erlanger's* case where Jessel MR in his judgment in the Court of Appeal [1977] 5 ChD at p. 103 said, "This action... is by a company against certain persons who were the promoters of that company and who were the vendors of the Company of a lease of the island *Sombrero*..." It is true that prior to the signing of the agreement, the four persons declared their interest in Allied Capital at the meeting of the protem committee of the Raintree Club held on 3 June 1982. [See AB2 p. 20]. But the other members present namely Leonard Tham, Tengku Azlan, Abdul Kadir Kassim, Lt. Col. Zarazillah and Clifford Tan proceeded on with the meeting and passed the following resolution:

> THAT the President and Vice-President be and are hereby authorised to enter into the Sale and Purchase Agreement with Allied Capital Sdn. Bhd. for the purchase from the same the entire issued and paid-up capital of Raintree Developments Bhd. for a total consideration of RM47,000,000 upon the terms and conditions set out in the said agreement (a copy of which is attached herewith).

Although the four persons have declared their interest in Allied Capital, they, as promoters of the Raintree Club, cannot run away from their fiduciary duty to the Club.

Tengku Abdullah and General Yusoff who are the first and second defendants respectively, are the principal figures in this case. They are the controlling shareholders and directors of Allied Capital, Raintree Development and in Cosmopleks.

Yeoh Chong Swee (the fourth defendant) is director of Allied Capital and Raintree Development and Cosmopleks. He is a consultant of Allied Capital. In the protem committee he advised members on the sale of purchase agreement and how the purchase price of RM47 million was arrived at. He signed the agreement on behalf of Allied Capital.

Low Nyap Heng (the third defendant) is the consultant who was responsible for setting up the Club. He is in Cosmopleks. He is also a shareholder of Allied Capital. He is also a member of the protem committee. He signed the agreement as secretary of Allied Capital. Leonard Tham (the fifth defendant) and Clifford Tan (the eighth defendant) are employees of Allied Capital. Leonard Tham is also the financial manager of AF Capital. Both of them are members of the protem committee.

Abdul Kadir Kassim (the seventh defendant) is one of the shareholders of Cosmopleks. He was acquainted with Mr. Reyes of the Ayala Group and he was brought in to help out with the project. He is the legal adviser of the Ayala Group and he drafted the memorandum of understanding. He was involved with the club project right from the beginning. He is also a member of the protem committee.

Tengku Azlan (the sixth defendant) is director of Raintree Development. He is also a member of the protem committee.

Lt. Col. Zarazillah (the ninth defendant) was appointed to the protem committee by Tengku Abdullah and General Yusoff. He is employee of Apera Sdn. Bhd. which is a company owned by Tengku Abdullah and General Yusoff.

In my opinion each of the defendants has an interest either as shareholder or as director or as employee of the companies owned by Tengku Abdullah and General Yusoff or the Ayala Group. When the protem committee passed the resolution on 3 June 1982 to purchase the shares in Raintree Development for RM47 million, all the defendants were not in a position to act impartially. There was no **independent** and intelligent judgment on the transaction to purchase the said shares. As promoters of the Raintree Club they were in a situation of confidence. I find that they were not in a position to give disinterested protection to the Club. Indeed nothing was done for the purpose of protecting the interest of the Club. The promoters failed to conduct an independent enquiry on the price of the shares. I find that there was bias on the part of the promoters and in the circumstances no protection was afforded to the Club.

On 24 August 1982, when the purchase of the Raintree Development shares was executed, there were 457 individuals and 96 corporations who had been approved as provisional members of the Club. These provisional members were not invited to consider the agreement dated 24 August 1982 on the ground that they were not members at that point of time. The defendants referred to them as applicants. These "applicants" had paid their entrance fees fully or partially. In his evidence at p. 317 of the Notes of Evidence, DW4 said,

> Q: On 24 August 1982, is that correct there were other persons who had applied to join the Club?
>
> A: Yes, it is correct there were other applicant candidates for membership who were existing at that point of time.
>
> Q: There were candidates at that time?
>
> A: Yes.
>
> Q: Were the candidates invited to consider the sale and purchase agreement dated 24 August 1982?
>
> A: They were not invited because they were not members at that point of time.

Raja Aziz said that the defendants knew that the provisional members and subsequent members would bear the liability to pay the purchase price. Instead, the defendants decided for themselves that the Club should purchase the said shares at a price which the defendants themselves determined. He said that by doing so, the Club was left with no protection. He contends that the defendants were biased in the whole transaction and the situation is therefore similar to that in *Erlanger*. See Lord Blackburn's speech at pp. 1272, 1275 and 1276. From the evidence I find that, when the defendants say that the RM47 million is a fair price for the shares, they are in fact looking at it from the point of view of the vendor, Allied Capital. DW4 was trying to get as much as possible for Allied Capital. He has no interest of

the Club in mind. The attitude of the defendants was that they would decide the price. The others had to accept that price. In his evidence at pp. 319 to 323 of the Notes of Evidence, DW4 said:

Q: The price of RM47 million, can you tell us in your own words how this figure of RM47 million was arrived at as the consideration for the purchase of the shares in RDB? When the offer was made to the protem general committee by the joint venture company as managed by Ayala Group to the whole club with the facilities to the Raintree Club?

A: Agreeing to purchase the club for RM47 million, we took into account a number of factors, namely that the club was at that time the only club that was for the purchase of membership designed as a sports and recreation club as opposed to the old buildings. It was purposely built for sports and recreation and it was the only club after independence that was available to any interested parties. There were no other clubs in development at that point of time. The concept that was proposed and developed by the Ayala Group from Phillipines which was translated in Malaysia. It was a unique factor and it was the only club that could offer transferable membership. It also offered members ownership of the club unlike the other clubs today which only offer you to use the facilities. We also took into account that the whole project was being financed by the developer. We were allowed to pay the RM47 million over four and half years without interest and under easy or deferred payment scheme and no security was required and the transaction was out of the ordinary because in the normal purchase and sale we have to pay the whole amount within three to six months or upon completion and hand over of the project. We also took into account the fact that this project is very high risk because as the promoter of the club we the protem general committee did try to approach the financial institution whether they would finance the development of the club or the acquisition. Since it has never happened before that promoter or businessman would rely solely on the sale of membership to pay such financial institution were not ready to consider, therefore taking into account all the factors, the uniqueness, the size, the easy payment terms and the risk involved of the project, we felt the RM47 million was a fair price.

Q: What about the fact, what is the impression of the shares, whether easily transferable and the fact the club at that point of time constituted two to three members?

A: In arriving at the RM47 million we considered the net tangible assets of the club. For us the net tangible assets would have to be considered. In consideration of RM47 million we also took into account the club has the capacity to accommodate three to four thousand members. If we use that three to four thousand members the club had a potential of getting RM100 million membership fees at an average price of RM25,000. Having considered the potential the RM47 million was a fair price.

Q: The plaintiffs in this matter had alleged that you should have obtained a valuation of the shares of RDB on 24 August 1982 before entering into the transaction, can you tell us what is your view on this?

A: The general committee was fully aware. When we first promoted a club we have been promoting the sale of shares of RDB. We were well informed by the project managers the project will cost an amount of money and the risk involved and the various other factors, so we felt we are all informed buyers. We all had a common goal and we were involved in the development and very involved in the committee so we were all fully aware. We had access to the information. We meaning the project managers and the developers and we were fully aware of what we were entering into. At that point of time the 11 members present and all the members were fully aware of the development and concept of the club, therefore no need to have the expenses of appointing a professional or merchant bank or valuers to determine the value.

Q: The plaintiffs also said that in arriving at the figure of $47 million in order to apply for the shares in RDB, you and the other committee member failed to make proper enquiry for the purpose of protecting of the club in relation to the acquisition of the shares?

A: To me the club, at that point of time had 11 members who were admitted as members. After that obtained the temporary certificate to operate. The temporary certificate had certain conditions which did not make it to consider to admit any other members and to us the protem committee that is the general committee the members were 11 at that point of time and they were fully aware of the situation having participated one way or the other with the project because they were informed and we thougt there was no further need to go through any other formalities.

Q: You were a committee member, did you on 24 August l982, when the agreement was signed and prior to that the approval of the committee and the EGM was given, did you as the committee member have before you all the relevant information to make you all a informed buyer?

A: Definitely. As a director of the land owning company and director of the developing committee, all the committee members were very well informed of the situation.

Q: It is also a suggestion that what the plaintiffs are suggesting is that the promoters were making perhaps excessive profit and condition to RM47 million?

A: As far as we are concerned as I mentioned earlier the reason that we agreed to the RM47 million is without regard to what to be the profit to the developers and as we were informed buyers we were concerned with what would be the club to us, not what it is going to cost the developer, in normal transaction one would not know what is the cost of the developer or whether it is something. We have to look at the potential, what is the value of the particular thing. Various factors are enumerated and I feel RM47 million is fair price irrespective what the developer makes. RM47 million under the sale and purchase agreement is fair and reasonable.

Q: Do you feel that you have in anyway cheated the members of the club who were in sideline to be full members?

A: Definitely not.

Q: Have you personally made any profit by agreeing on this 24 August 1982 transaction?

A: I have no interest in the company or owned the company, I was there as a professional adviser for my client. I don't have any equity in the company that carried out the project, neither do I have any interest.

Under re-examination, DW4 admitted that he was in fact acting more in his capacity as director of Allied Capital and Raintree Development (see p. 379 of the Notes of Evidence). The evidence also shows that the protem committee decided that the sale and purchase agreement in respect of the shares be approved and sent to the EGM. The same people were present at the EGM except for Miss Elizabeth Goon. The defendants therefore ignored the interest of the club they sought to promote.

The plaintiffs are contending that the defendants were only interested in securing a purchase price of RM47 million which had been predetermined by the defendants. The figure was prepared by DW5, one of the defendants. DW5 was an employee of AF Capital. He admitted that he started with the figure of RM47 million which was the figure Allied Capital wanted. He started working on the figure with rough estimate. Another defence witness, DW1 is an accountant. He was asked to ascertain the fair value of the entire issued and paid up capital

of Raintree Development. He said that the price of RM47 million was a reasonable price. According to him net tangible assets can also be a fair value. On DW1's evidence, Raja Aziz says,

> One glaring defect in D18 related to the so-called "financed charges" which ALC incurred from its borrowings and which it passed to RDB. This was obviously totally indefensible since legally RDB had paid for the whole of the contract price of RM19 million in advance. In spite of the audited accounts clearly showing this, DW1 refused to accept it and insisted that the interests were payable by RDB. He contended that the cheque for RM19 million given by ALC to RDB in payment of the RM19 million RDB shares allotted to it, and the cheque for the same amount delivered almost immediately by RDB to ALC in payment of the contract sum, constituted merely an exchange of cheques with no money passing. He therefore still maintained that RDB was still obliged to reimburse ALC for the interest it had to incur from the RM19 million it had to raise to finance the construction of the Club House. This was a surprising attitude taken by an expert accountant. His view was, in fact, not accepted even by DW4

DW6, another expert witness called by the defence, disagreed with DW1. In his evidence at p. 581, DW6 said:

> Q: I want you to look from the Accountant's point of view. Allied Capital had been paid in full for the contract price in 1981 in advance. It did not have the money because this was just an exchange of cheques earlier, you understand?
>
> A: Yes.
>
> Q: That is what they called cross cheques but there is no money, but they have been paid in full. Now they wanted to borrow money to do this works. So, they borrowed money. From the Accountant's point of view would the financial charges incurred in respect of that borrowing by ALC be the responsibility of RDB?
>
> A: For the RM19 million?
>
> Q: For the RM19 million.
>
> A: Should not be.

After considering all the relevant evidence in Civil Suit 204 of 1986 I am satisfied that the defendants have been in breach of their fiduciary duty to the Raintree Club. It is to be noted that the situation in the present case is similar to that in *Erlanger's* case. Although it is my finding that all the defendants are in breach of the fiduciary duty to the Club, I am bound by the pleading and my decision on this issue is to grant an order in terms of prayer (1) of the amended statement of claim.

Since there is fiduciary relationship between the defendants and the Raintree Club and its members and since there has been a breach of that relationship, the rights of the members of the Club are affected. It is not only those who were "members" at the time the agreement was signed who are liable to pay the purchase price. All members of the Club including present members are liable to pay the purchase price.

In my opinion, the plaintiffs are entitled to bring a representative action under O. 15 r. 12 of the Rules of the High Court 1980. The plaintiffs are suing on behalf of themselves and all the other members of the Raintree Club except the defendants. All the persons who are represented by the plaintiffs, (not including the defendants) have the same common interest in bringing the action. Because of the breach in fiduciary relationship they are liable to pay the purchase price of the Raintree Development shares. In *Roche v. Sherrington*, Slade J at p. 610 of his judgment said,

> If the plaintiff wishes to involve RSC O. 15 r. 12 for the purpose of bringing an action against named defendants as representatives of a wider class, one essential condition is that the persons represented should have the same common interest in defending the proceedings in question...

I agree with the above passage and in my view the plaintiffs have satisfied the essential condition in the circumstances of the present case.

There remains one more point to be considered, namely, the plaintiffs' allegation that the defendants had failed to exercise due care, skill and diligence. As stated the defendants were in breach of their fiduciary duty to the Club. As promoters of the Club, they failed to get an intelligent and independant report as to the value of the shares. They also failed to get independant advice. They were only concerned in promoting their own interest and there was biase on their part. It is, therefore, my finding that all the defendants, as promoters of the Club had failed to exercise due care, skill and diligence in the exercise of their duty in promoting the Club.

After considering all the evidence and the circumstances in Civil Suit 204 of 1986, I am of the view that the plaintiffs should succeed in their claim.

I next turn to Civil Suit 1084 of 1986. The main issue raised by the defendants in that suit is the question of undue influence. It is contended by Mr. Anantham, Counsel for the plaintiffs in that suit, that the plaintiffs are not guilty of undue influence. He cites the House of Lords decision in *National Westminister Bank v. Mogan* [1985] 1 ALL ER where it was held that a transaction could not be set aside on the grounds of undue influence unless it was shown that the transaction was to the manifest disadvantage of the person subjected to the dominating influence. Mr. Anantham submits that if the defendants are alleging undue influence, then he must ask the Court to rescind the agreement. This, he says the defendants have not done. In his written submission at pp. 29 & 30, Mr. Anantham states:

> The nature of the relief prayed for by the defendant in their counterclaim in seeking not a rescission of the agreement as is expected of them under the law, speaks volumes about whether the defendants were induced to enter into the agreement of 24 August 1982. What the defendants seek in their counterclaim is not the rescission of the agreement but a substitution of some of the terms of the agreement by new terms, more favourable to them. More precisely, the defendants want to be allowed to retain the Club and all the benefits received by them pursuant to the agreement of 24 August 1982 but at the reduced price of RM24 million and that they be compensated for the monies paid by them in excess of this amount. This conduct on the part of the defendants afford ample evidence that the defendants are not complaining about undue influence being exerted by the plaintiffs to enter into the agreement but merely that the price is excessive.

In his opening address, Mr. Anantham said that the plaintiffs were quite happy to rescind the agreement, get back the Club and land and "give back their money". He submits that the figure of RM47 million is the correct figure.

Raja Aziz refers to s. 16(1) & (2) of the Contracts Act which states:

> 16.(1) A contract is said to be induced by 'undue influence' where the relations subisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another:

(a) where he holds a real or apparent authority over the other, or **where he stands in a fiduciary relation to the other**; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress. (Emphasis added)

He submits that the principle of undue influence includes a situation where one party dominating the other is in fiduciary relationship. He refers to *Lloyds Bank v. Bundy* [1975] 1 QB 326. Lord Denning MR, in his judgment at p. 338 said,

> The third category is that of 'undue influence' usually so called. These are divided into two classes as stated by Cotton LJ in *Allcard v. Skinner* [1887] 36 Ch.D. 145, 171. The first are those where the stronger has been guilty of some fraud or wrongful act - expressly so as to gain some gift or advantage from the weaker. The second are those where the stronger has not been guilty of any wrongful act, but has, through the relationship which existed between him and the weaker, gained some gift or advantage for himself. Sometimes the relationship is such as to raise a presumption of undue influence, such as parent over child, solicitor over client, doctor over patient, spiritual adviser over follower. At other times a relationship of confidence must be proved to exist. But to all of them the general principle obtains which was stated by Lord Chelmsford LC in *Tate v. Williamson* [1866] 2 Ch. App. 55, 61.

At p. 339, Lord Denning said as follows:

> Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word 'undue' I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being 'dominated' or 'overcome' by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal. With these explanations, I hope this principle will be found to reconcile the cases. Applying it to the present case, I would notice these points.

In *Tate v. Williamson,* Lord Chelmsford LC said at pp. 60 & 61:

> The jurisdiction exercised by Courts of equity over the dealings of persons standing in certain fiduciary relations has always been regarded as one of a most salutary description. The principles applicable to the more familiar relations of this character have been long settled by many well-known decisions, but the Courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise. Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.

On the question of why his client is not asking the Court to rescind the agreement, Raja Aziz says (at p. 611 of the Notes of Evidence) that there is no question of the plaintiffs' being able to claim to rescind the Agreement in their action against the defendants for breach of fiduciary duty. He says that the defendants were not the vendors of the Raintree Development shares. The owners of the shares were Allied Capital. He contends that the plaintiffs' only remedy against the defendants is for compensation for the loss they have suffered as a result of the defendants' breach of duty.

At p. 612 of the Notes of Evidence, Raja Aziz states:

> If Your Lordship finds that there has been breach of fiduciary duty insofar as the individual defendant is concerned that is in C/S 204/86 they would have brought about upon the plaintiff the loss in the sense that we have to pay RM47 million for a property which is less than that and therefore the difference must be compensated to the plaintiff.

Raja Aziz goes on to say at pp. 616, 617 & 618:

> The point I think my learned friend is making is this, that if we really say that there was undue influence then we say the contract was void then we should be prepared to give back the property and they should pay us. It is in the argument influence in the ordinary sense that there was representation made and therefore there was influence and we found there was misrepresentation and avoided that contract. This is not that type of case. This is the type of case which follow the relationship from the vendor to the buyer where the vendor is represented in that Protem Committee. They were the same people. ALC has defendants number 1 and 2. There were interested in the outcome of the sale to the extent they want to make as much money as possible. They were there with all their appointees in the Protem Committee. They were there to purchase property from ALC which they themselves were owners of the shares. In that context there was this dominating influence which ALC would bear on the purchasers in the sense that ALC would be dictating to the purchasers in the sense of their alter ego which is the first and second defendants. It is to the extent they were acting for the Club, the first and second defendants and the other defendants were actually not able to exercise a free mind. They were more concerned with making as much money as possible for ALC because they stood to gain as shareholders. As for the question of rescission it has never been the intention of the plaintiffs to rescind. There has been no election made. We wanted to take on the contract. The contract was completed. It was an executed contract but we say that because of the breach of fiduciary duty on the part of the individual defendant, the Protem Committee members and because of the undue influence exercised by the seller ALC to this Protem Committee in the guise of alter ego of ALC that we had loss because of the excessive purchase price and it is that we are trying to recover. There has never been election that we indicated, we wanted the property back. The argument is this, because the property is worth something double the price may be RM90 million, let's assume that is the position. Where does that put us? Does it mean that because it is now worth more than RM47 million, let's say RM100 million, does it mean it is right for these people who were acting in fiduciary capacity to have sold the property to the Club at an inflated price? That is the question. The point is not the value now. The point Your Lordship have to consider the value at the time of the signing, what should we pay for the shares. The way it is being argued is this, you have got what you bargained for. That is not the issue. The issue was if there was a breach of fiduciary duty then did they perform their duty properly? They couldn't have because there was a breach but this would be that they have taken care in saying that the value was in fact RM47 million. They have independant advice. As Roger Yue said, we are looking at RM47 million. We work backwards. We add this as charges and finally we come to this nice figure which we want at the first place. I don't think we want it this way. Your Lordship will see from the rest of p. 22 of the submission until the bottom of the first

paragraph that I suggested proper way to compute the loss would be difference of what should have been the fair value and the actual price we paid. We paid RM47 million. Of course, we only paid RM41 million but the contract price was RM47 million. If Your Lordship come to a conclusion that it is less than RM41 million that is what we should have paid, anything in excess of that should be refunded to us. The fair value of the nett tangible asset have been worked out by Thomas Scott, PW2 to be at around RM24 million based on the figures in the audited accounts of Kassim & Chan and also on the valuation of M/s. Jones, Wootten & Lang. That would be the fair value and that was accepted by Roger Yue himself. What is the fair price? Now again he has agreed that the fair price would take into account not just the fair value but certain other things and in this aspect of the case I think there is suggestion made by the defendant that we must take into account the uniqueness of the Club. If one reads all these nebulous theory of what is uniqueness in a property, it must be eventually what should the property be. I think Your Lordship would like to come to a percentage. They have suggested that the reasonable margin of profit would be 40%.

In support of his contention that Allied Capital should pay back the difference, Raja Aziz cites the Federal Court decision in *Mahesan v. Malaysian Government* [1975] 1 MLJ 77. That case deals with the issue of principal and agent where the agent accepted bribes and induced the principal to enter into a contract with the person who has paid the bribe. The Federal Court decided that the principal was entitled to recover from the agent the bribe money and compensation for loss. The Court ordered the agent to pay the principal compensation in the sums of RM488,000 less RM45,000 equal RM443,000 with interest. Mahesan appealed to the Privy Council but his appeal was dismissed. See [1978] 1 MLJ 149. In its judgment the Federal Court expressed the view that an agent of a cooperative society is in a similar position as directors of a company and the duty of such agent is of a fiduciary nature. At p. 80 of its judgment, the Federal Court said,

Now as to the law, it is my view that the society, being registered under the Cooperative Societies Ordinance No.33 of 1948, is a body corporate (s. 8 of the Ordinance) and that the appellant being its director and honorary secretary was its agent.

In *Ferguson v. Wilson*, Cairns LC said at p. 89:

'What is the position of directors of a public company? They are merely agents of a company. The company itself cannot act in its own person, for it has no person, it can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agents.'

The duties of an agent of a corporate body were stated in general terms by Lord Cranworth, LC at p. 471 in *Aberdeen Railway Company v. Balikie Brothers*, in the following words:

**'A corporate body can only act by agents, and it is of course the duty of those agents to act as best to promote the interest of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal**. And it is a rule of universal application that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.'

More specifically, the law is that where an agent who has been bribed so to do, induces his principal to enter into a contract with a person who has paid the bribe, and the contract is disadvantageous to the principal, the principal may recover from the agent the amount of the bribe which he has received. (Emphasis added)

In the present case, the Raintree Development shares were purchased by the defendants for RM47 million. The sale and purchase agreement dated 24 August 1982 was signed by Tengku Abdullah and General Yusoff on behalf of the Club. I have made a finding that the defendants as promoters of the Raintree Club were in fiduciary relationship with the Club. I have also

made a finding that there has been a breach of fiduciary duty by the defendants. DW1, the accountant confirmed the figure of RM47 million. But I find that his evidence is unsatisfactory. His view on the interest was not accepted by DW4. The view was also not accepted by DW6. In the circumstances I find that DW1 is an unreliable witness and his evidence cannot be accepted. PW2, the accountant who testified for the plaintiff said that the entire value of the shares as at 24 August 1982 was RM25,718,000. I find that PW2's evidence is more acceptable based on the reasons given by him in arriving at that figure. It is therefore my finding that the value of the shares as at 24 August 1982 was RM25,718,000. In the counterclaim, the defendants however state that the actual value of the shares purchased was RM24,597,160. The defendants claim that they have paid a sum of RM41,168,876 to the plaintiffs and therefore they are entitled to counterclaim the sum of RM16,571,734. In my opinion judgment should be entered on the defendants' counterclaim for the sum of RM15,450,876 being the difference between RM41,168,876 and RM25,718,000.

For the reasons stated above, I make the following order:

(1) In respect of Civil Suit 204 of 1986 I order that the plaintiffs be at liberty to enter judgment against the defendants as prayed in the statement of claim.

(2) The plaintiff's claim in Civil Suit 1084 of 1986 is dismissed and I enter judgment on the defendants' counterclaim for the sum of RM15,450,876 pursuant to prayer (a) and the sum of RM556,752 pursuant to prayer (b) with interests thereon at the rate of 8% per annum from date of judgment till date of realisation and costs. The plaintiffs' counterclaim is dismissed.

(3) Civil Suit 96 of 1986 is to be heard on a date to be fixed.